No. 14537

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, for the use of Westinghouse Electric Supply Company, a corporation and all similarly situated, *Appellant,*

vs.

JOHN V. AHEARN, SR., an individual doing business under the firm name and style of Ahearn Electric Company and THE AETNA CASUALTY AND SURETY COMPANY, a corporation, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

ANSWERING BRIEF OF APPELLEES

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HONORABLE JOHN C. BOWEN, *Judge*

ANSWERING BRIEF OF APPELLEES

RESTATEMENT OF FACTS

At all times material to this action the appellee John B. Ahearn, Sr., was engaged in the electrical contracting business in Bremerton, Washington. Prior to the first day of February, 1952, the United States Navy, through its contracting officer, called for bids in connection with a proposed award for major repairs to the electrical distribution quarters area, Puget Sound Navy Shipyard at Bremerton, Washington (R. 148, Def. Ex. A3). Appellee bid on the work which was re-

quired to be performed, and in general so far as this action is concerned the work to be performed involved not only the furnishing of labor but also the furnishing of materials. The work actually involved repairs and additions to the Navy Yard telephone communications system (Def. Ex. A3, Pl. Ex. 18). The invitation and specifications in connection with the work insofar as telephone cable is concerned, allowed the bidder to bid on the basis of supplying and installing either paper-wrapped telephone cable or latex-covered telephone cable (R. 32).

Appellee Ahearn, who will hereafter be referred to as Ahearn, through his foreman, A. L. Rockwell, contacted the appellant Westinghouse Electric Supply Company, which will hereafter be referred to as Westinghouse, for the purpose of obtaining prices in connection with the electrical materials required to perform the work. Under date of January 31, 1952, Westinghouse supplied to appellee Ahearn a quotation on materials to be used by Ahearn in connection with his bid (R. 31, Pl. Ex. 3). The testimony as to how the quotation was received is in conflict. Appellee Ahearn testified the quotation was delivered personally in Bremerton by the salesman of Westinghouse, one Merritt Upson (R. 147, 148). The testimony of the Westinghouse Company would indicate that the quotation was mailed to Bremerton, with the figures previously phoned by Westinghouse. Of major importance is the fact that the bid opening was at the hour of 2:00 o'clock p.m., February 1, 1952, and it would be necessary for the figures and quotation to be received by appellee Ahearn in time to submit his bid. In

the quotation furnished one type of cable only was mentioned, the paper-wrapped cable, and stated a delivery date in the third quarter of 1953 for the telephone cable. No quotation was requested or given on latex-covered cable (R. 32). The invitation, and contract subsequently entered into, required completion of the contract in August, 1952 (Finding of Fact No. VII, R. 18). In the quotation furnished the following language appears:

> "Prices billed will be those in effect at the time of shipment. *Orders on telephone cable should be placed direct with Graybar Electric Company, Seattle.*"

(Pl. Ex. 3, Finding of Fact No. VI, R. 17). Appellee Ahearn was the successful bidder, and his bid and contract were, among other things, for the furnishing and installation of paper-wrapped telephone cable.

Subsequent to the notification of the award, and on February 5, 1952, the salesman of Westinghouse, Merritt Upson, was in the city of Bremerton and took an order from appellee Ahearn direct with the Westinghouse Company for the supplying of paper-wrapped telephone cable as distinguished from requiring Mr. Ahearn to order the cable directly from the Graybar Electric Company (R. 58). This order (Finding of Fact No. XI at R. 22, 23; and R. 190) is the only order signed by appellee Ahearn. In this connection, the testimony of Mr. Ahearn is that prior to submitting his bid, and in Bremerton, Mr. Upson, the salesman of Westinghouse, had assured him that paper-wrapped cable could be furnished in connection with the work in ample time to complete the contract on schedule (R. 149, 150), that

if the entire order for materials were placed with Westinghouse, Westinghouse could obtain the materials, and in the order which was given on February 5, 1952 (R. 149, 150, Pl. Ex. 4), it is clear that a deviation occurred from the directions in the quotation furnished, in that Westinghouse solicited and accepted an order for all of the materials rather than requiring that the telephone cable be directly ordered from Graybar Electric Company (R. 58). The trial court in its findings (Finding of Fact No. XI at R. 22, 23) found that this was the only contract entered into between Ahearn and Westinghouse. Westinghouse knew the contract had to be completed in the fall of 1952 (R. 59) and that at least as early as March, 1952, the penalty for delay was $40.00 per day (R. 48).

Subsequently, and after the time specified for completion of the contract, there was delivered through Westinghouse at the job site in Bremerton, Washington, latex-covered telephone cable, this delivery occurring in the early part of January, 1953. As of December 31, 1952, the Westinghouse Company at Seattle billed appellee Ahearn for latex-covered telephone cable at an increase in price over and above paper-wrapped telephone cable, which is the amount involved in this action. In other words, Ahearn has paid to the Westinghouse Company the full purchase price of paper-wrapped cable and the suit instituted by Westinghouse is for the difference in the price of the two types of cable (R. 83).

Upon receipt of the latex-covered cable, the Westinghouse Company was immediately contacted (R. 162)

and was advised that latex-covered cable instead of paper-wrapped cable had arrived. The Westinghouse Company was likewise and at the same time advised that latex-covered cable had never been ordered.

Upon arrival of the latex-covered cable at the Bremerton Navy Yard, appellee Ahearn advised the Navy Yard that latex-covered cable had arrived, that it had not been ordered, and asked instructions, as well as a possible increase in contract price or a reordering of materials (Pl. Ex. 20). The contracting officer of the Navy immediately communicated with Mr. Ahearn by letter (Pl. Ex. 20A), in substance advising Mr. Ahearn that the latex-covered cable met the specifications of the contract and ordering him to immediately install the latex-covered cable or, in the alternative, be subjected to a daily penalty as provided in the contract (R. 144, Pl. Ex. 20A) of $40.00 per day for delay. Under compulsion, the latex-covered cable was installed, at all times under protest to the Westinghouse Company (R. 82), and at no increase in contract price to appellee Ahearn (Finding of Fact No. X, R. 20).

The action of Westinghouse was on the basis of an express contract, in that it was contended by Westinghouse that on the 10th day of March, 1952, the defendant Ahearn had changed his order from paper-wrapped cable to latex-covered cable at an increase in price, being the amount sued for in this action. In support of the theory of an express contract, Westinghouse produced as witnesses its salesman, Merritt Upson, who, at the time of trial testified that a change order had been given to him at the place of business of appel-

lee Ahearn by appellee Ahearn directly (R. 44); that the order was written up by salesman Upson and in substance that it was by virtue of this order that the latex-covered cable was shipped. In the pre-trial deposition of salesman Upson taken on behalf of the appellees, salesman Upson testified that the change order had been placed with him by the witness A. L. Rockwell, then the foreman of appellee Ahearn (R. 61, 62). The Westinghouse Company had, among other witnesses in support of its suit on an express contract, A. L. Rockwell, whose testimony was taken by deposition. Witness Rockwell testified he did not order the latex-covered cable (R. 133, 134). Westinghouse also produced a former employee of appellee Ahearn, Lawrence B. Blackman, now employed by Rockwell in his own business at Moses Lake, Washington, who testified that he was in the office of appellee Ahearn on March 10, 1952, rewinding motors (R. 119), when appellee Ahearn ordered latex-covered cable (R. 103). The time book of witness Blackman (R. 123, 124) discloses that he was engaged in Navy Yard work on the day in question, that the entries in the time book are in his own handwriting, and if he did Navy work by his own testimony he would not be on the rewind bench (R. 125). The testimony of Mr. Ahearn (R. 153) and his wife, Mrs. Goldie Ahearn (R. 199), testifying for the appellees, disclosed that no Navy Yard work was done at the place of business of appellee Ahearn, and that on the 10th day of March, 1952, witness Blackman was in fact working but at the Navy Yard.

We think that it is unnecessary to detail further the conflicts in testimony occurring at the time of trial,

since it is conceded by the appellants that although their original cause of action (R. 3) was based upon an express contract, that cause of action has been abandoned (Brief of Appellant, pp. 5 and 46). Analyzing the Findings of Fact entered by the court (Finding of Fact No. VI, R. 16, at R. 17 and 18), Westinghouse accepted an order from Ahearn for paper-wrapped telephone cable. This was by way of a written order signed by appellant Ahearn personally and dated February 5, 1952. This order (Pl. Ex. No. 4) was accepted by Westinghouse and was the only document in connection with materials for the work to be performed signed by Ahearn (R. 189, 190), and in Finding of Fact No. XI (R. 20 and 21) the court found,

> "We start out with a situation that the only contract or order bearing the definite signature of the defendant Ahearn is Plaintiff's Exhibit 4, which was the original order and contract for this cable and which called for not the latex here in controversy but paper-covered cable, which all agree was the subject of the original contract."

The court further found in Finding of Fact No. V (R. 16) that the amount sued for by the appellant Westinghouse, plaintiff below, was the difference in price between paper-covered telephone cable and latex-covered telephone cable. The court further found (Finding of Fact No. VII, R. 18) that the time for Ahearn to complete his contract with the Navy was in the month of August, 1952. The court further found (Finding of Fact No. IX, R. 19) that in the month of January, 1953, latex-covered telephone cable was delivered instead of paper-covered telephone cable, that at the time of such

delivery the time for completion of Ahearn's contract with the Navy had passed, that at or about the time of the receipt of the latex-covered cable Ahearn received from Westinghouse an invoice showing an increase in price over paper-wrapped telephone cable of the principal amount involved in this action, and that the increase in price and substitution of cable was protested by Ahearn prior to its use in completing the contract. The court further found (Finding of Fact No. X, R. 20) that Ahearn was instructed by the Navy Department to proceed with the installation of the latex-covered cable and no increase in contract price was given to Ahearn by its use, and that Ahearn did not benefit by such substitution. The court further found (Finding of Fact No. XI, R. 20 at R. 22):

> "The only convincing testimony which cannot be impaired in any way by other testimony now in the record is in defendant's favor and is Plaintiff's Exhibit 4 which is the original order and contract signed by Mr. Ahearn and which calls not for latex but for paper-covered cable. Other than that, all of the vitally material testimony in the case is so hopelessly in conflict and so obviously shows that some witness or witnesses have purposely, knowingly and wilfully falsified as to the material facts in this matter, that this Court can come to but one conclusion, and that is that the plaintiff in this case has failed to sustain the plaintiff's burden of proof in support of the cause of action alleged in plaintiff's complaint.
>
> "Plaintiff contends that, in any event, the evidence establishes an implied contract entitling plaintiff Westinghouse to a recovery against defendants. The defendant Ahearn, however, is not

shown by the evidence to have received any greater benefit from the substitution of latex cable than he before the substitution had a contract right to receive from the use of paper-covered cable. Therefore, no implied contract liability is visited upon that defendant. The United States of America through the Navy Department is the only one whose position might be said to be better today by reason merely of the use on the job of latex instead of paper-covered cable, but no relief for or against the United States is sought here. In this action, plaintiff Westinghouse is not entitled to any recovery based on implied contract."

ARGUMENT

Specifications of Error by the Appellant

An analysis of the specifications of error by the appellant shows that but two errors assigned are material to a determination of this appeal. In Assignment No. 1, appellant contends that the court erred in not finding (Finding of Fact No. XI, R. 23) that an implied contract in fact existed between Westinghouse and Ahearn, and in Assignment No. 2 that the court erred (Finding of Fact No. X, R. 20) in finding that Ahearn did not benefit by his receipt and use of the latex-covered cable.

An Implied Contract in Fact Did Not Exist

The Findings of Fact, Conclusions of Law and Judgment of the court were that no express contract existed between Westinghouse and Ahearn in connection with the substitution by Westinghouse of latex-covered cable at an increase in price over paper-wrapped cable, which had been ordered and which order had been accepted by Westinghouse.

No assignment of error was based upon that portion of the trial court's Finding of Fact No. XI (R. 19 and 20) stating, "That the said increase in price and substitution of cable was protested by the defendant Ahearn prior to the use by the defendant Ahearn of the substituted cable," and the testimony of plaintiff's witnesses confirms the objection and protest as being continuous (R. 81, 82, 83 and 84). It is, of course, conceded that the latex-covered telephone cable was used in performance of the contract; however, the use of the cable was under order of the Navy Department, which order was in writing and dated January 26, 1953, and was introduced in evidence as Plaintiff's Exhibit 20A. The communication from the Navy Department pointed out the fact that the date of completion of the contract was then October 28, 1952 (that date being some three months prior to the date of the Navy Department's letter); that the material delivered met the requirements of the contract; that Ahearn should proceed to install the material then on the job site (referring to the latex-covered cable) or in the alternative the Navy would invoke the liquidated damage penalty of the contract, which was in the amount of $40.00 per day.

It is to be borne in mind that Westinghouse knew of Ahearn's required completion date of the contract (R. 59) and, of course, of his continuous denial of having ordered latex-covered telephone cable and his continuous objections to the increase in price of the substituted cable.

There could be no contract implied in fact as between Westinghouse and Ahearn. The law with reference to

contracts implied in fact is well stated in the case of *Ross v. Raymer,* 34 Wn.(2d) 128, 201 P.(2d) 129, wherein the court said:

> "A true implied contract, or contract implied in fact, is an agreement which depends for its existence on some act or conduct of the party sought to be charged, and arises by inference or implication from circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention on the part of the parties to contract with each other. *Troyer v. Fox,* 162 Wash. 537, 298 Pac. 733, 77 A.L.R. 1132; *McKevitt v. Golden Age Breweries, Inc.,* 14 Wn.(2d) 50, 126, P.(2d) 1077; *Kellogg v. Gleeson,* 27 Wn.(2d) 501, 178 P.(2d) 969; *Ammerman v. Old Nat. Bank,* 28 Wn.(2d) 239, 182 P.(2d) 75; 12 Am. Jur. 498, *et seq.,* Contracts, Secs. 4, 5; 17 C.J.S. 318, 319, Contracts, Sec. 4(b).
>
> "In each of the first three cases cited in the preceding paragraph, we quoted with approval the following language taken from *Western Oil Refining Co. v. Underwood,* 83 Ind. App. 488, 149 N.E. 85:
>
> " 'A true implied contract is an agreement of the parties arrived at from their acts and conduct viewed in the light of surrounding circumstances, and not from their words, either spoken or written. *Like an express contract, it grows out of the intentions of the parties to the transaction, and there must be a meeting of minds.* Such a contract differs from an express contract only in the mode of proof.' (Italics ours.)"

A meeting of the minds between Westinghouse and Ahearn at no time occurred and at all times Ahearn protested the substitution of material and the increase

in contract price. This, of course, is admitted, as is the fact that Ahearn at no time recognized any liability to Westinghouse for more than the materials and cable he had actually ordered.

The law is well settled that a contract cannot be implied against the express declaration of the person to be charged. *Consolidated Products Co. v. Blue Valley Creamery Co.* (8th Circuit) 97 F.(2d) 23; *Linddeke v. Chevrolet Motor Co.* (8th Circuit) 70 F.(2d) 345; *Municipal Water Works Co. v. City of Ft. Smith* (D.C. Ark.) 216 Fed. 431; *American Mutual Liability Ins. Co. v. McDiarmid,* 211 Ala. 127, 99 So. 849.

It seems to us that the action on the part of Westinghouse in substituting latex-covered telephone cable for paper-covered telephone cable is similar in principle to the case of *Helber v. Schaible, et al.,* 183 Mich. 1379, 150 N.W. 145. In that case the plaintiff purchased an automobile from the defendant. The automobile was warranted; however, from time to time it became necessary for the automobile to be returned to the dealer-seller for repair. When the automobile was in the possession of seller for a period, a fire occurred in which the automobile was damaged. The dealer recommended that the car be returned to the factory for complete repairs, including, of course, the fire damage. The purchaser of the automobile, the plaintiff, told the dealer he would not pay for such repairs. Nevertheless, the dealer sent the car to the factory. After repairs, the purchaser of the car was billed for them. The purchaser plaintiff brought an action for replevin and recovered the automobile from the dealer. The court

held that there was no implied promise on the part of the plaintiff to pay for the repairs to the automobile, which he had never ordered and to payment for which he had expressly objected before they were made. In this case, if Westinghouse chose to substitute cable which was not ordered, we see no difference from a situation where a dealer in automobiles has unauthorized repairs made.

Cases Cited by Appellant

The cases cited by the appellant, commencing at page 21 of appellant's brief, to support the proposition that Ahearn must pay the billing price of the latex-covered telephone cable as billed instead of the price of paper-wrapped cable which was ordered, may be distinguished. In *Mutual Sales Agency v. Hori,* 145 Wash. 236, 259 Pac. 712, a number of telegrams were sent between the parties in connection with the ordering of potatoes. The appellant in that case shipped potatoes to the respondent and attached to its bill of lading a sight draft for the purchase price. Respondent, after having wired appellant and received an explanatory telegram as to a difference in quality and price of the potatoes shipped, paid the draft, took the potatoes and brought the action at a later date to recover the difference in what he contended to be the proper purchase price. The court held that the respondent acted voluntarily in paying the draft and that the general rule is that one person cannot make himself the creditor of another by voluntarily paying a demand of the other which he is under no obligation to pay, and the court

further found that the payment made was with full knowledge of all the circumstances.

In *Cuschner v. Pittsburgh-Hickson Co.,* 91 Wash. 371, 157 Pac. 879, action was again brought to recover a portion of the purchase price for goods contended not to have been ordered. In the *Cuschner* case, in addition to having paid the purchase price of goods shipped, the purchaser placed the merchandise in his store and some of it was sold. The court in that case held that the goods had been accepted.

In *Koths v. Shagren,* 38 Wn.(2d) 52, 227 P.(2d) 446, groceries were shipped to the defendant grocer and the goods were received at his usual place of business, with invoices. No complaint was made as to the invoice price and the court announced its adherence to the rule that *where a statement of account has been rendered and no objection made* (italics ours), the buyer by his silence does not preclude or estop himself from challenging the correctness of the account, but his silence does establish *prima facie* the accuracy of the items without further proof.

In the case of *Western Asphalt Co. v. Henrik Valle,* 25 Wn.(2d) 428, 171 P.(2d) 159, a situation existed whereby Western Asphalt Co. brought suit against defendant Valle for services performed in connection with a bid by the defendant Valle. No discussion was had relative to payment for the services rendered. The court stated that under the general rule an implied contract must be shown to have been performed under reasonable expectation of payment on the part of the person performing the services, and that the person

sought to be charged must have known that the services were to be charged for. The court held that in connection with instructions, the belief of the defendant Valle was immmaterial if he as a reasonable man should have understood that compensation was expected. As stated by the Washington Supreme Court in *Chandler v. Washington Toll Bridge Authority,* 17 Wn.(2d) 591, 137 P.(2d) 97, this action was one brought upon a contract implied in fact.

In none of the cases cited by the appellant do we find any case where a contract has been implied in fact contrary to the direct expression of the parties, nor do we find in any case cited by the appellant a situation on a factual basis such as this case, where a supplier of materials accepted an order to furnish materials for the performance of a specific contract for a third party (the Navy) knew when the contract was to be completed, substituted materials at a higher price after the completion date, received the protest of the contractor Ahearn and refusal to pay the price billed prior to any use of the merchandise, and where the contractor Ahearn protested the substitution of materials and was forced to nevertheless utilize them at no increase in contract price.

There Was No Implied Contract in Law

It seems to us that the finding of the trial court (Finding of Fact No. XI, R. 20 at R. 23) is governing. The court said:

> "The defendant Ahearn, however, is not shown by the evidence to have received any greater benefit from the substitution of latex cable than he before

> the substitution had a contract right to receive from the use of paper-covered cable. Therefore, no implied contract liability is visited upon that defendant. No liability attaches to the surety defendant except as to the liabilities of the defendant Ahearn. The United States of America through the Navy Department is the only one whose position might be said to be better today by reason merely of the use on the job of latex instead of paper-covered cable, but no relief for or against the United States is sought here."

Under the facts as adduced there is no doubt that Ahearn was required by the Navy letter of January 26, 1953, (Pl. Ex. No. 20a) to proceed to install the latex-covered telephone cable or be subject to a daily penalty of $40.00 for each calendar day's delay. Similarly, there is no question but what time had expired for the completion of his contract with the Navy.

The brief of the appellant, at page 30, correctly quotes from Sec. 1.b., *Restatement of the Law of Restitution,* in which in substance it is stated that a person confers a benefit upon another if he gives the other possession of or some interest in money, land, chattels, etc., or performs services beneficial to or at the request of the other, etc. * * * or satisfies a debt or duty of the other; and the section further states,

> "He confers a benefit not only where he adds to the property of another, but also where he saves the other some expense or loss."

However, appellant fails to preface the quotation wherein it is stated in Sec. 1.,

> "A person who is *unjustly* enriched at the ex-

> pense of another is required to make restitution to the other." (Italics ours)

and, in Sec. 1.c.,

> "Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the persons, it is unjust for him to retain it. The mere fact that a person benefits another is not in itself sufficient to require the other to make restitution therefor."

If it be accepted that Ahearn, for the purpose of argument, received a benefit in that he was not required to sustain a $40.00 per day penalty for delay, when the contract with the Navy was at that time three months beyond its completion date, by using the latex-covered cable, was he enriched and was his enrichment unjust? The court's Findings of Fact (Finding No. X, R. 20) show that Ahearn received no increase in contract price and of course, as a result, Ahearn did not profit. What Ahearn received was merely the contract price he would have received had Westinghouse supplied the paper-covered telephone cable. Ahearn has paid to Westinghouse the price of paper-covered telephone cable. In other words, Ahearn is in the same position as he would have been had Westinghouse fulfilled its accepted order for paper-covered telephone cable. Since Ahearn is in that position, he is not enriched nor is he unjustly enriched.

In *Chandler v. Washington Toll Bridge Authority,* 17 Wn.(2d) 591, 137 P.(2d) 97, the two elements of a contract implied by law are stated: (1) that the party

sought to be held has been enriched, and (2) that the enrichment must be unjust.

The Miller Act

In the appellant's concluding argument on page 44 of its brief, it seems to be argued, first, that the appellant urges its right to recover merely because of the invoice price, or, second, under quasi contract (contract implied in law), or, third, separately under the Miller Act, Title 40, U.S.C., Sec. 270a. *et seq.*

The right of action of Westinghouse against appellee Ahearn arises out of an alleged contract between itself and appellee Ahearn. The right of action against appellee The Aetna Casualty and Surety Company, a corporation, arises out of the provisions of what is known as the Miller Act, Title 40, U.S.C., Secs. 270a. and 270b. Title 40, U.S.C., Sec. 270a.(a) provides:

> "Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, * * * (2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person." (Referring to the contractor awarded the contract)

The payment bond (Pl. Ex. No. 1) in part provides as follows:

> "THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the principal entered into

a certain contract with the Government, numbered and dated as shown above and hereto attached;

"NOW, THEREFORE, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue."

Title 40, U.S.C., Sec. 270b.(a) in part provides as follows:

"Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor * * * shall have the right to sue on such payment bond for the amount or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him:"

Subsection (b) provides for the institution of action in the United States District Court for any district in which the contract was to be performed and executed.

The action herein instituted by Westinghouse was for money due (R. 3, 4, 5, 6) against both the contractor, appellee Ahearn, and the contractor's surety, appellee The Aetna Casualty and Surety Company, a corporation.

Nowhere in the Miller Act is there any provision for the payment of attorney's fees to the successful party,

nor in the payment bond furnished in this action is there any provision for the payment of attorney's fees. It is contended on the part of the appellant that where a local statute provides for attorney's fees in a materialman's lien foreclosure, attorney's fees are allowed in a Miller Act suit, and in support of this proposition appellant cites *United States v. Breeden,* 110 Fed. Supp. 713 (D. C. Alaska, 3rd Div., 1953). A careful examination of the *Breeden* case, *supra,* shows that Sections 55-11-51 and 55-11-52 of the Alaska Code allow the court to fix attorney's fees in the following manner: Section 55-11-51, Compensation of Attorneys, provides:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action or defense thereto, which allowances are termed costs."

Section 55-11-52 provides for costs which are allowed in various types of actions, but is briefly stated as follows: Subsection 1., dealing with the recovery of or possession of real property; Subsection 2., dealing with fines and forfeitures; Subsection 3., involving an open mutual account; Subsection 4., relating to recovery of personal property; Subsection 5., in actions not thereinbefore specified for the recovery of money or damages, where the plaintiff shall recover $50.00 or more.

The court, in allowing attorney's fees in the *Breeden* case, *supra,* quoted the statute in its decision and pointed out that the Alaska Code did provide for attor-

ney's fees and that not only were the sections referred to a part of the procedural statutes of Alaska, but were a part of an Act of Congress approved June 6, 1900, entitled "An Act Making Further Provision for a Civil Government for Alaska and for Other Purposes," 31 Stat. 321.

In the court's decision nothing is said about materialmen's lien foreclosures, and from a reading of the case and the Alaskan statutes cited, it is apparent that the court in Alaska has the power to allow attorney's fees in any kind of an action as a matter of discretion. It is apparent also from a reading of the case that the allowance by the court was under Subsection 5. of Section 55-11-52, where attorney's fees are allowable for the recovery of money where the plaintiff recovers more than $50.00.

The only other case that we have been able to find dealing directly with the subject is the case of *United States to the use and benefit of Watsabaugh & Company, et al, v. Seaboard Surety Co., et al.* (D. C. Montana) 26 F. Supp. 681, which was an action under the Heard Act (the act preceding the Miller Act), in which there were numerous parties seeking to recover against the Seaboard Surety Co. In connection with the claim of the Interstate Heating & Plumbing Company to recover for labor and materials, attorney's fees were sought.

The court denied any recovery of attorney's fees under the Montana statute. The decision is not as clear as it might be because there were apparently two grounds for the denial of attorney's fees, one being that

the claim of the Interstate Heating & Plumbing Company was announced in open court to have been settled and that the settlement as such did not constitute a recovery, and, second, that the statutes of Montana in any event did not provide for the recovery of attorney's fees in this type of action. The court in the Montana case quoted with approval from *Albrecht v. Albrecht,* 83 Mont. 48, 209 Pac. 158, 161, as follows:

> "Costs co nominee were not recoverable by either party at common law. They are the creatures of the statute, and in this state the right to recover costs must depend upon our code provisions."

The court also quoted with approval from *McBride v. School District No.* 2, 88 Mont. 110, 290 Pac. 252, 255 (an action for the recovery of salary against the defendant School District, in which attorney's fees were sought, and denied):

> "The items which may be recovered as costs in an ordinary action are enumerated in Section 9802, Revised Codes, 1921. This action is exclusive, except insofar as certain cases are taken out of its operation by special statutes, and in the absence of statute, stipulation or rule of court (assuming such rule may be promulgated) attorney's fees are not so recoverable."

The Washington statute cited by the appellant, Sec. 12, Chap. 24, Laws of 1893; R.C.W. 60.04.130, concerns the allowance of attorney's fees in actions to foreclose liens of laborers and materialmen. This action is not such an action, but is an action for money due. As we have pointed out, the Alaska case cited by appellant, *United States v. Breeden,* 110 F.Supp. 713, allowed attorney's fees under the Alaska Code by reason of the dis-

cretionary power of the court in Alaska to allow attorney's fees in connection with the recovery of money.

Applying properly the *Breeden* case, *supra,* and the case of *United States to the use and benefit of Watsabaugh & Company, et al, supra,* the applicable Washington statues are as follows:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are to be termed costs." L. 1854, p. 201, Sec. 367; Code 1881, Sec. 505; R.R.S., Sec. 474; R.C.W., Sec. 4.84.010.

> "When allowed to either party in the superior court, costs to be called the attorney fee, shall be as follows: (1) in all actions settled before issue is joined, five dollars; (2) in all actions where judgment is rendered without a jury, ten dollars; (3) in all actions where judgment is rendered after impanelling a jury, fifteen dollars." L. 1854, p. 202, Sec. 374; Code 1881, Sec. 512; R.R.S., Sec. 481, R.C.W., Sec. 4.84.080.

With reference to the liability of the appellee The Aetna Casualty and Surety Company, a corporation, the liability can in no way extend beyond the condition of its bond approved by the contracting officer or of the Miller Act, and as was correctly stated by the trial court (Finding of Fact No. XI, R. 23), "No liability attaches to the surety defendant except as to liabilities of defendant Ahearn."

CONCLUSION

In conclusion, we respectfully submit that the judgment of the trial court should be affirmed, in that the appellant has abandoned its theory of liability on an express contract.

That the appellant has not established a contract implied in fact for two reasons: First, that to establish a contract implied in fact, as was stated in *Ross v. Raymer,* 32 Wn.(2d) 128, 201 P.(2d) 129, in quoting with approval from *Western Oil Refining Company v. Underwood,* 83 Ind. App. 488, 149 N.E. 85.

> "Like an express contract, it grows out of the intention of the parties to the transaction, and there must be a meeting of the minds."

and by reason of the additional rule that a contract will not be implied in fact against the express declaration of the party to be charged; and, second, from the finding of the trial court in which the court stated in part in Finding of Fact No. XI (R. 20 at R. 22):

> "The only convincing testimony which cannot be impaired in any way by other testimony now in the record is in defendants' favor and is Plaintiff's Exhibit 4 which is the original order and contract signed by Mr. Ahearn and which calls not for latex but for paper-covered cable. Other than that, all of the vitally material testimony in the case is so hopelessly in conflict and so obviously shows that some witness or witnesses have purposely, knowingly and wilfully falsified as to the material facts in this matter, that this Court can come to but one conclusion, and that is that the plaintiff in this case has failed to sustain the plaintiff's burden of proof in support of the cause of action alleged in plaintiff's complaint."

That a contract cannot be implied in law under the law of restitution by reason of the fact that two elements are necessary: (1) A benefit to the person sought to be charged, and (2) that the person sought to be charged has been unjustly enriched, as was stated by the trial court in Finding of Fact No. XI (R. 20 at R. 23):

> "* * * The defendant Ahearn, however, is not shown by the evidence to have received any greater benefit from the substitution of latex cable than he before the substitution had a contract right to receive from the use of paper-covered cable. Therefore, no implied contract liability is visited upon that defendant. No liability attaches to the surety defendant except as to liabilities of defendant Ahearn. The United States of America through the Navy Department is the only one whose position might be said to be better today by reason merely of the use on the job of latex instead of paper-covered cable, but no relief for or against the United States is sought here. In this action, plaintiff Westinghouse is not entitled to any recovery based on implied contract."

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